

**United States Court of Appeals
For the Ninth Circuit**

No. 17461 (formerly USDC WD Wash. No. 2543)

PACIFIC QUEEN FISHERIES, a partnership, (AUGUST P. MARDESICH, MIKE BAROVIC, JOHN BRESKOVICH, NICK JASPRICA, * * * JOHN K. VILICICH, *et al.*), d/b/a PACIFIC QUEEN FISHERIES, *Plaintiffs-Appellants*,

vs.

ATLAS ASSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, GLENS FALLS INSURANCE COMPANY, BUFFALO INSURANCE COMPANY, UTAH HOME FIRE INSURANCE COMPANY, and COMMONWEALTH INSURANCE COMPANY, *Defendants-Appellees*,

and

GEORGE HULL, WILLIAM PECK and O. E. ROYER,
Additional Parties at the Instance of the Court,

No. 17460 (formerly USDC WD Wash. No. 2348)

(consolidated for trial with No. 2543)

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and

GEORGE HULL, WILLIAM PECK and O. E. ROYER,
Additional Plaintiffs,

vs.

L. SYMES, *et al.* (UNDERWRITERS AT LLOYDS and Co-INSURING COMPANIES at LONDON), *Defendants-Appellees*.

**SUPPLEMENT TO APPENDIX V OF
DEFENDANTS'-APPELLEES' (UNDERWRITERS')**

ANSWERING BRIEF

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May 8, 1962

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SUPPLEMENT TO APPENDIX V

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1. Reason for Supplement

Underwriters' Answering Brief dated April 6, 1962, set forth in Appendix V, pp. 29A-40A, certain "Record Reference to *Possibly* challenged Findings of Fact" because PQF in their Opening Brief had not designated which Findings of Fact they claimed to be erroneous. See Underwriters' Answering Brief, pp. 4, 24-25, 30-31, 32-34, and 29A-40A.

PQF's Reply Brief now undertakes to designate those Findings of Fact which it challenges. See PQF's Reply Brief, p. 20; and their Appendix I, pp. 23-32.

An examination of PQF's Appendix I reveals that Underwriters had supplied record references in Appendix V of their Answering Brief to all possibly challenged Findings of Fact except the following which Underwriters did not then believe were challenged:

Finding X(E). See PQF's Reply Brief, p. 24, line 9.

Finding XI(C). See PQF's Reply Brief, p. 25, line 2.

Finding XII(G). See PQF's Reply Brief, p. 25, line 18.¹

Accordingly, these three Findings are documented below, underscoring apparently challenged portions and furnish record references to so much of the Transcript of Proceedings as was designated for printing, in exactly the same manner as in Appendix V of Underwriters' Answering Brief.

¹This is the only subsection of Finding XII not annotated in Underwriters' Appendix V, but it may now be challenged by PQF's broad reference to Finding XII under Point 11 at p. 25 of their Reply Brief.

2. Record References to Further Challenged Findings of Fact

“X.

“E. At the time of the surveys by Marquat *and Elkins* there was nothing in the situation that was observable, by reasonable inspection, which would have disclosed that the owners and managers had made or intended to make the changes in gasoline capacity or discharge facilities which existed at the time of the loss of the PACIFIC QUEEN.¹ Plaintiffs’ counsel now claims, on brief, that, whenever these changes were made, they were a ‘simple job that would not take two men 30 minutes’ (Pl. Memo on law issues filed pursuant to Court’s Oral Decision, Doc. 136, p. 8, line 11).”

¹R. 989, 1204-1208, 1216, 1537-1538, 1561-1565, 1627-1630; the statement of appellants’ counsel, while not designated, is not contested.

“XI.

“C. While she was at Friday Harbor, she still had on board some remaining 2,000 gallons of gasoline. (USCG Report, Ex. 30, p. 4, R. 1060). On September 9, 1957, at Friday Harbor, from 500 to 600 gallons of gasoline were spilled from one of the four tanks in the hold of the PACIFIC QUEEN into the interior of the vessel.¹ Although now minimized and treated as trivial by plaintiffs, this was a catastrophe of major proportions. It created great hazards to the ship, life and property, both then and later. Gasoline from the spill soaked and impregnated large parts of the wooden hull and structure of the vessel.² It was not a sudden spill but began early in the evening preceding its discovery at 4 a.m. by the cook.³ In the course of the spill, liquid gasoline and gasoline fumes permeated the lower after portion of the vessel.⁴ The spill was reported to one of the plaintiff owners and the manager of the vessel, August Mardesich, while he was in Friday Harbor on September 9, 1957.⁵ He inspected the vessel, but did not give any specific orders as to the methods to be used in cleaning up the vessel; did not order any chemical tests to be made as to whether she was

gas-free, and did not order any plugging-up of the valves on the other gasoline tanks to prevent further similar spills; nor did he order the discharge of the remaining gasoline from the other tanks.⁶ *The methods that were taken to purge the vessel of the gasoline were not adequate and did not constitute the exercise of due diligence considering the serious nature of the spill. On this question the testimony of Mr. Kniseley and Mr. Spaulding, both men of extensive practical experience in this field as well as possessed of great theoretical knowledge, is unquestionably correct that the measures taken to clean up the spill were inadequate.*⁷ In addition to Mr. Mardesich, Mr. Jasprica, also an owner of the PACIFIC QUEEN, was present at the time of the spill and participated in the *inadequate* clean-up measures.⁸ *The vessel was unseaworthy after the Friday Harbor spill for want of full and proper precautions to clean and purge the ship after the spill.* She was also unseaworthy because of the continuing hazard of her altered method of gasoline discharge, and the absence of precaution to prevent further spills resulting; in extremely hazardous below-deck carriage of bulk gasoline. A plug was put into the valve on one of the tanks but no precautions were taken to prevent similar spills from the remaining three tanks.⁹ All of the plaintiffs' witnesses, including two of the part-owners, who were experienced in the handling of gasoline, agreed that this was a serious want of due diligence.¹⁰ *All of defendants' witnesses agreed that it was extraordinarily hazardous to permit a vessel to be in such condition, or to send the vessel to sea in such condition, and that it might take a period of weeks before the vessel was sufficiently gas-free to operate with safety.*¹¹

¹R. 1128-1131, 1144-1145, 1546-1550; Ex. 438 (designated but not printed).

²R. 653-661, 685-686, 730-731, 757-758, 816, 836-840, 844-846, 853-857.

³R. 554-556, 598, 601, 1128-1129, 1299-1301, 1546-1550, 1578-1579; Ex. 438 (designated but not printed).

⁴R. 559-563, 575, 586-587, 977-980, 1132, 1147-1149, 1392, 1394-1397, 1399, 1429-1430, 1432, 1550-1552, 1555-1558, 1593.

⁵R. 586, 977-982, 995-997, 1553, 1582, 1614, 1617.

⁶R. 586-588, 977-982, 995-997, 1553, 1582, 1614-1617.

^{6a}R. 1264-1265.

⁷R. 653-659, 838-840.

⁸R. 556-557, 559-566, 1147-1150, 1553-1558.

⁹R. 1144, 1580-1582.

¹⁰R. 1586-1587, 1594-1596, 1617-1619.

¹¹R. 653-659, 814-817, 838-840, 844-846.

“XII.

“G. *The Court was much more favorably impressed by the testimony of defendants' witnesses, Professor Moulton, Mr. Kniseley and Captain Lees, not only by reason of their greater scientific qualifications and practical experience and ability in the areas as to which they testified, but also because they were much more adequately apprised of the true facts of the explosion and fire.*¹”

¹R. 611-620, 638-646, 650-662, 669-672, 746-750, 844-851.

Dated at Seattle, Washington, May 8, 1962.

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